



**Gathuru v Chege & 5 others (Civil Application E374 of 2020)  
[2021] KECA 255 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 255 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E374 OF 2020  
HM OKWENGU, F SICHALE & J MOHAMMED, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**JANE RUGURU GATHURU ..... APPLICANT**

**AND**

**PETER GATHURU CHEGE ..... 1<sup>ST</sup> RESPONDENT**

**ERNEST MWANIKI WANGUI ..... 2<sup>ND</sup> RESPONDENT**

**REGINA NYAMBURA ..... 3<sup>RD</sup> RESPONDENT**

**CO-OPERATIVE BANK OF KENYA LTD ..... 4<sup>TH</sup> RESPONDENT**

**CHIEF LANDS REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

*(Being an application for injunction pending hearing and determination of the appeal against the ruling of the High Court of Kenya at Nairobi, Environment and Land Court (Eboso, J.) dated and delivered on 7th October 2020 in ELC No. 345 of 2019)*

**RULING**

Background

- 1) The Notice of Motion before us is dated 30th November, 2020 brought under the provisions of Rule 5 (2)(b) of the *Court of Appeal Rules*. It is taken out by Jane Ruguru Gathuru (the applicant) who has moved this Court seeking inter alia: -

“That this Honourable Court be pleased to issue an interim injunction restraining the 3rd and 4th respondents whether by themselves or their agents or whomsoever from selling or



disposing of TITLE NUMBER DAGORETTI/RIRUTA/1648 and determination of this appeal.”

Peter Gathuru Chege, Regina Nyambura, Ernest Mwaniki Wangui, Co-operative Bank of Kenya Ltd, Chief Lands Registrar & The Attorney General are the 1st, 2nd, 3rd, 4th, 5th, & 6th respondents respectively.

- 2) A brief background is that the 1st respondent who is the applicant’s husband was registered as proprietor of TITLE NUMBER DAGORETTI/RIRUTA/1648 (the suit property) through succession of the Estate of his late mother. In 2012, he applied to transfer the suit property to the 2nd respondent but the Land Control Board declined to issue consent due to an objection raised by the applicant. The 2nd respondent took possession of the suit property and proceeded to file ELC No. 518 of 2012 seeking the 1st respondent’s eviction from the suit property.
- 3) In 2014, the 1st respondent transferred the suit property to the 3rd respondent who was financed by the 4th respondent through a charge registered against the title to the suit property. Subsequently, the 4th respondent in exercise of its statutory power of sale advertised the sale of the suit property by way of public auction. Thereafter, the applicant filed a suit which is the subject of the intended appeal (ELC No. 345 of 2019) against the respondents seeking to preserve the suit property and filed an application for temporary injunction. The learned Judge vide a ruling delivered on 7th October, 2020 dismissed the application stating that: -

“There is no prima facie evidential materials presented to the court at this stage to demonstrate that the 3rd and 4th defendants were privy to the alleged fraudulent activities.”
- 4) Aggrieved by the said decision, the applicant filed a notice of appeal intimating her intention to file an appeal against the judgment. Pending the hearing and determination of the intended appeal, the applicant filed the instant application which is supported by her affidavit where she avers that the transfer of the suit property to the 3rd respondent whilst she had custody of the original title documents imputes illegality and fraudulent activity between the 1st, 3rd and 5th respondents; that she is apprehensive that if the orders sought are not granted, the 4th respondent will transfer the suit property under its statutory power of sale rendering the suit property out of her reach; that unless this Court intervenes, she will lose her right and entitlement to the suit property as guaranteed in the Constitution occasioning her and her five children great loss and prejudice.
- 5) The application was opposed by the 4th respondent vide the replying affidavit sworn by James Karanja (Mr. Karanja), the 4th respondent’s Remedial Officer. Mr. Karanja averred that in 2013, the 3rd respondent was granted a loan facility of Kshs. 9,100,000/= by the 4th respondent to finance the purchase of the suit property which property was used as security; that the 3rd respondent failed to pay the outstanding loan and the 4th respondent exercised its statutory power of sale; and that the applicant has not satisfied the requirements for the grant of an interim injunction and the application should be dismissed.

#### Submissions

- 6) This application was canvassed by way of written submissions pursuant to the Court of Appeal Practice Directions to mitigate the spread of the COVID-19 Global pandemic. The applicants submitted that they have an arguable appeal as the learned Judge determined the merit of the suit on the basis of affidavit evidence; and that the learned Judge erred in failing to consider that the balance of convenience in light of the duplicity of titles lay in preservation of the suit property pending determination of the suit.



## Determination

- 7) We have considered the application, the grounds in support thereof, the submissions, the authorities cited and the law. The jurisdiction under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.
- 8) The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR* where the Court delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
- 9) In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.
10. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR* (Civil Application No. Nai. 31 of 2012) where this Court described an arguable appeal in the following terms:
  - “vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
  - viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”
11. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable inter alia whether the applicant has a beneficial interest in the suit property. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the Bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.
12. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought, in *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* (supra) this Court stated that:
  - “ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.



x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

13. In determining whether or not an appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its merits. In the instant application, the applicant's main contention is that as the wife of the 1st respondent she has a beneficial interest in the suit property. We find that in the circumstances of the instant application, if the orders sought are not granted, the suit property will be transferred or charged to third parties and the substratum of the appeal will have been lost and the intended appeal shall have been rendered nugatory.
14. In the circumstances, we are persuaded that the applicant has demonstrated an arguable appeal which will be rendered nugatory if the orders sought are not granted.
15. From the circumstances of the application before us, we are satisfied that the applicant has satisfied the twin principles for the grant of an injunction pending the hearing and determination of the intended appeal in accordance with the jurisprudence underlying the consideration of the twin principles summarized by this Court in the case of Stanley Kange' the Kinyanjui (supra).
16. The upshot is that the application dated 30th November, 2020 is allowed. Costs shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**Signed**

**DEPUTY REGISTRAR**

